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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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09/924,298

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Vincent Bryan

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3319

27683 7590 02/26/2009

HAYNES AND BOONE, LLP

IP Section

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EXAMINER

PHILOGENE, PEDRO

ART UNIT

PAPER NUMBER

3733

MAIL DATE

DELIVERY MODE

02/26/2009

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 09/924,298	<b>Applicant(s)</b> BRYAN ET AL.	
	<b>Examiner</b> Pedro Philogene	<b>Art Unit</b> 3733	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 19 December 2008.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) See Continuation Sheet is/are pending in the application.
- 4a) Of the above claim(s) 56-61, 93-96, 101-103, 106-110, 112-119, 121 and 122 is/are withdrawn from consideration.
- 5) ☒ Claim(s) 91 and 92 is/are allowed.
- 6) ☒ Claim(s) 3, 10-17, 23-40, 43-44, 66, 67, 70-71, 75-76, 86-89 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)            | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)   | Paper No(s)/Mail Date. _____                                      |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date <u>6/23/08</u> .   | 6) <input type="checkbox"/> Other: _____                          |

Continuation of Disposition of Claims: Claims pending in the application are 3,10-17,23-40,43,44,56-61,66,67,70,71,75,76,86-89,91-96,101-103,106-110,112-119,121 and 122.

***Continued Examination Under 37 CFR 1.114***

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 5/9/08 has been entered.

***Election/Restrictions***

Applicant's election without traverse of Group I , claims 3,10-17,23-40,43-44,66-71,75,76,86-89,91-92 in the reply filed on 12/19/08 is acknowledged.

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 75-76, 86, 87 are rejected under 35 U.S.C. 103 (a) as being unpatentable over Fuhrmann et al. (5,002,576) in view of Gauchet (6,395,032).

With respect to the above claims, Fuhrmann et al disclose a bone joint implant comprising a sleeve (1) positioned between two opposing shells (3,4) has an upper and lower contact surface, and at least one sealable opening (21) in at least one of the shells, for the introduction of the lubricant into the implant after the implant has been

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assembled; as set forth in column 2, lines 50-68, column 3, lines 1-68, column 4, lines 1-12; and as best seen in FIGS. 1-4.

It is noted that Furhmann et al did not teach of the introduction of a lubricant material between the central body and the opposing shells; as claimed by applicant. However, in a similar art, Gauchet provides the evidence of the use of implant having a core (22) and the introduction of lubricant to create an increase volume in the nucleus cavity revitalizing the overall disc space.

Therefore, given the teaching of Gauchet it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the device of Furhmann et al; as taught by Gauchet, to create an increase volume in the nucleus cavity revitalizing the overall disc space.

Claims 3, 10-17, 23-40, 43, 44, 66-67, 70, 71, 88, 89, are rejected under 35 U.S.C. 103(a) as being unpatentable over Buttner-Janz et al. (5,401,269) in view Buechel et al. (5,868,796) in view of Fuhrmann et al. (5,002,576) in view of Gauchet (6,395,032).

It is noted that the above combination of references did not teach of a liquid lubricant, which occupies at least a portion of the cavity and a closable passage between its outer surface and its inner surface; as claimed by applicant. However, in a similar art, Fuhrmann et al., evidence the use of openings in the shells to serve to fill or ventilate the interior of the implant.

Therefore, given the teaching of Fuhrmann et al., it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the

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device of Buttner-Janz/Buechel/Bryan et al, as taught by Fuhrmann et al., to serve to fill or ventilate the interior of the implant.

It is noted that the above combination of references did not teach of the introduction of a lubricant material between the central body and the opposing shells; as claimed by applicant. However, in a similar art, Gauchet provides the evidence of the use of an implant having a core (22) and the introduction of lubricant to create an increase volume in the nucleus cavity revitalizing the overall disc space.

Therefore, given the teaching of Gauchet, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the device of Furhmann/Janz/Buechel et al; as taught by Ray et al., to create an increase volume in the nucleus cavity revitalizing the overall disc space.

As to the language "adapted to being sealed with a plug" it is obvious that the opening of Furhmann et al is adapted to being sealed by a plug.

### ***Response to Amendment***

Applicant's arguments with respect to claims 3,9-17,23-40,43,44,66-71,75,76,86-89,91,92 have been considered but are moot in view of the new ground(s) of rejection.

### ***Allowable Subject Matter***

Claims 91, 92 are allowed.

### ***Conclusion***

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

4,932,969

6-1990

Frey et al

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Any inquiry concerning this communication or earlier communications from the examiner should be directed to Pedro Philogene whose telephone number is (571) 272-4716. The examiner can normally be reached on Monday to Friday 6:30 AM to 4:00 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Eduardo Robert can be reached on (571) 272 - 4719. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Pedro Philogene/  
Primary Examiner, Art Unit 3733  
February 24, 2009

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